ORIGINAL

RECEIVED
JUN 0 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1425

STATE OF MARYLAND,

Petitioner

v.

AVERY V. FERRELL

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Avery V. Ferrell, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached brief in opposition to petition for writ of certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's supporting affidavit is not attached because despite reasonable efforts of counsel to to locate Respondent's in sufficient time to secure his affidavit, counsel has been unable to do so. Petitioner has filed the attached brief in opposition and motion to proceed in forma pauperis without benefit of the supporting affidavit in order to comply with this court's order that a response be filed in the above captioned case by June 7, 1990.

Accordingly, we respectfully pray that this Court let the Respondent proceed in forma pauperis without pre-payment of costs or fees or the necessity of giving security therefore.

_____
JUSTICE

INDEX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

ISSUE PRESENTED

Where the State has consolidated all charges in a single presecution and the jury acquits on one charge, but is unable to agree on another charge sharing a common issue of ultimate fact, do the principles of collateral estoppel embodied in the Fifth Amendment's Double Jeopardy Clause bar retrial of the undecided charge?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1425

STATE OF MARYLAND,

Petitioner

v.

AVERY V. FERRELL

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S BRIEF

The Respondent, by his attorneys, George E. Burns, Jr., and Jose' Felipe' Anderson, Assistant Public Defenders, requests that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

The underlying factual question in this case is simply whether Respondent was the perpetrator of an armed robbery. The procedural history of the State's attempt to prove that Respondent was the robber was clearly explained by the Court of Appeals:

The State's Attorney filed four criminal informations against Ferrell, each relating to one of the victims, and each charging the following offenses:

Count 1 - Robbery with a deadly weapon;
Count 2 - Attempted robbery with a deadly weapon;
Count 3 - Robbery;
Count 4 - Assault with intent to rob;
Count 5 - Assault
Count 6 - Theft of less than $300;
Count 7 - Use of a handgun in the commission of a felony or crime of violence;
Count 8 - Unlawful carrying of a handgun.

A fifth information charged Ferrell with assault with intent to murder one of the victims.

Ferrell has since stood trial four times in the Circuit Court for Baltimore City. At the first trial on the above-described charges, the jury returned a verdict of not guilty of assault with intent to murder and guilty of the other charges except counts 2 and 4.[2] Ferrell moved for new trial, and the motion was granted.[3] The second trial resulted in a hung jury on all charges submitted to the jury. At the third trial, the state desired that only the charges of armed robbery and use of a handgun in the commission of a felony or crime of violence would be submitted to the jury. The jury found Ferrell not guilty of using a handgun in the commission of a felony or crime of violence, but the jury was unable to reach a verdict as to armed robbery. Once again a mistrial was declared.

* * *

---

[2] It is not clear from the record what happened to counts 2 and 4.

[3] The new trial was apparently granted on the ground that the jury's verdicts were not unanimous. (App. 3a-4a).

REASONS FOR DENYING THE WRIT

The modern law of collateral estoppel was summarized by this Court in Ashe v. Swenson, 397 U.S. 436 (1970). The Court recently delineated the meaning and scope of Ashe:

> In Ashe v. Swenson, 397 U.S. 436 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. Id., at 445-446. We defined the collateral estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., at 443. Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had had to have reached a directly contrary conclusion. Dowling v. United States, 493 U.S. ___, 107 L.Ed.2d 708, 717 (1990).

The obvious import of this reasoning is that under the facts of this case if Respondent had been tried and acquitted of the handgun offense he could not have been subsequently

tried for armed robbery. The State does not dispute this conclusion; rather the State argues that the instant case is different because when Respondent was acquitted of the handgun offense, the jury was unable to reach a verdict as to armed robbery.

The State's argument rests on the holding that at a single trial, inconsistent verdicts, no matter how illogical, are not unconstitutional. United States v. Powell, 469 U.S. 57 (1984). This holding is inapplicable to the case at bar. First, this tolerance of the illogical results rests on the unique role of a jury.

> "[O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see McDonald v. Pless, 238 U.S. 2643 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality. (emphasis add d) Id. at 67.

Once the jury has disbanded, these considerations no longer exist. A future jury cannot be privy to the deliberations of the first jury and cannot reconstruct its judgment or deliberations.

Second, inconsistent verdicts at a single trial do not involve the Double Jeopardy Clause.

> The primary goal of barring re-prosecutions after acquittal is to prevent the State from mounting successive prosecutions and thinly wearing down the defend-

ant. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 307 (1987).

See also Powell, supra at 64.

The difference between a single trial and multiple trial is well-illustrated by this Court's decision in Sealfon v. United States, 332 U.S. 575 (1948). Two indictments were returned against Sealfon; one for conspiracy and the other for the substantive offense. The conspiracy charge was tried first and Sealfon was acquitted. Sealfon was then tried for the substantive offense and convicted. Although, recognizing that "the commission of the substantive offense and a conspiracy to commit are separate and district offenses" and that "with some exceptions one may be prosecuted for both," this Court held that the conviction violated the Double Jeopardy Clause. Id. at 579-580. The reason is that once there is a final litigation as to an issue, that issue may not be relitigated in a subsequent trial no matter what would have been constitutionally permissible at the first trial.[1]

---

[1] The State's position is unpinned by a erroneous conclusion. At a single trial it is not unconstitutional for there to be inconsistent verdicts. However, the State has no right to have inconsistent verdicts. Thus, a state court may choose not to permit such verdicts, may mandate that trial judges instruct juries not to render them and may limit them to non-jury trials. See Shell v. State, 307 Md. 46, 512 A.2d 358 (1986).

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in own jurisprudence. (App. 20a), (quoting United States v.

An inherent problem in the State's position is defining the status of a mistrial. "[U]nder Maryland common law a mistrial is equivalent to no trial at all..." Thus, it "is not a final determination, and resolves no issue...." (App. 7a). Under this analysis, the only "judgment" was the acquittal, thus making the case indistinguishable from a case where the armed robbery was not tried. The status of a mistrial under Maryland law is not a federal question and may not become one so long as it does prove a "double jeopardy violation". See Ludwig v. Massachusetts, 427 U.S. 628, 631 (1976).

Moreover, it is difficult to see how a mistrial can have any other status. The State has not suggested how some other status may be accorded a mistrial or how that "status" might effect other litigation involving mistrials. See, e.g., Cook v. State, 281 Md. 665, 671, 381 A.2d 671, cert. denied, 439 U.S. 839 (1978). The focus in applying collateral estoppel can only be in final judgments. Here the jury acquitted Respondent of the handgun charge and refused to convict him of armed robbery. This Court has recognized as much.

> Nor was the jury's conviction of respondent on the charge of incest an implied acquittal of the offense of sexual assault, there would have been an implied acquittal only if the jury had been pre-

---

Mespowlede, 597 F.2d 329 (2nd Cir. 1979)

There is no good reason to accept the State's suggestion and to change a blemish on the criminal justice system to a major disfigurement of the system.

> sented with charges of both sexual assault and incest and had chosen to convict respondent of incest. Montana v. Hall, 481 U.S. 400, 403 n.1 (1987).

The crucial point in this case is that the State had its opportunity to prove that Respondent was guilty of both armed robbery and the handgun offense. The State failed to convince the jury and its failure is not a reason to abort the ordinary rules of collateral estoppel. The petition should be denied.

Respectfully submitted,

Alan H. Murrell
Public Defender

George E. Burns, Jr.,
Jose' Felipe' Anderson
Assistant Public Defenders

Counsel for Respondent